than 6 nor more than 12 months. The verdict of the jury found the accused guilty of the offense charged in the indictment, and fixed his fine at $100. The court, exercising the discretion given it under the statute, in entering up judgment for the fine, added 60 days' imprisonment in jail in addition to the fine, and also imposed a further punishment of 6 months in jail upon the accused. This latter punishment of 6 months in jail was, as the accused insists, clearly without authority. There was no charge in the indictment upon which the accused was prosecuted that the offense charged was a second or subsequent offense.

[6] It is well settled that where an offense is punishable with a higher penalty, because it is a second or subsequent offense of the same kind, such severer punishment cannot be inflicted unless the indictment charges that it is a second or subsequent offense, because by the rules of criminal pleading the indictment must always contain an averment of every fact essential to the punishment to be inflicted. Welsh's Case, 4 Va. 57; Rand's Case, 9 Grat. (50 Va.) 738; Wharton's Cr. Pl. & Pr., §§ 934, 935; 1 Bishop's Cr. Law (7th Ed.) § 961; Bishop on Stat. Cr. § 240.

It follows from what has been said that the action of the court in imposing the additional punishment of six months in jail upon the accused, and declaring that he should constitute a part of the state convict road force, was erroneous, and to that extent said judgment must be reversed and annulled, and in other respects affirmed.

Reversed in part; affirmed in part.

CITY OF RICHMOND v. BURTON.

June 12, 1913.

[78 S. E. 560.]

1. **Municipal Corporations (§ 360*)—Sewer Construction—Extra Excavation—Knowledge of City.**—Where during the excavation of a sewer trench under a city contract, it was found that the sides of the trench would give way, and to prevent this it was necessary to put in timber and fill in the sloughing places with bricks, whereupon the contractor suggested a remedy by excavating the ditch wider than provided by the profiles, which suggestion was adopted with

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

the consent of the city's assistant engineer, and was advantageous to the city, and it also appeared that new and wider stakes were set after the contractor's suggestion was adopted, it sufficiently appeared that the city had knowledge of the alteration in the plans, and that it was done with the approval of the city's assistant engineer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.*]

2. Municipal Corporations (§ 360*)—Public Improvements—City Engineer—Authority—"Extra."—A sewer construction contract provided that, before commencing any part of the work, the city engineer might make such changes in the lines, grades and dimensions which do not entail any extra expense to the contractor, and in the prosecution of the work, should there be any change in the lines, grades and dimensions of the work to be done which may entail cost to the contractor, it was agreed that the amount of the extra cost should be ascertained before the commencement of the work, and the agreement as to the amount to be paid should be final. Held, that the word "extra," as used in such provision, was equivalent to additional work which was required in the performance of the contract, and not necessary to such performance in the sense that the contract could not have been carried out without it, but necessary in the sense that by means of it the contract could be more conveniently and beneficially performed in the interest of both parties thereto, and did not include work arising out of and entirely independent of the contract, something not required in its performance, and hence did not take from the city engineer authority to agree to pay for extra excavation during the performance of the contract made necessary by the character of the soil in which the improvement was constructed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.*

For other definitions, see Words and Phrases, vol. 3, p. 2624.]

3. Municipal Corporations (§ 360*)—Sewer Contract—Construction—Extra Work.—A municipal sewer contract provided that the size and form of the sewer, its location and grade, etc., should conform to the plans and specifications of a city engineer subject to such modification as he might deem necessary during the execution of the work; that the trenches were to be dug in accordance with the lines, grades, depths, and widths which would be given by the engineer or his assistant from time to time, and, should it be necessary to increase the dimensions greater than shown on the plans, there should be no extra charge, but the contractor should be paid at the same rate per cubic yard as given in the original proposal, that all directions necessary to complete any of the provisions of the specifications would be given by the city engineer or his assist-

ant in charge whenever requested, and that the contractor would be required to protect such stakes or marks and conform his work accurately thereto. Held, that where, by reason of the character of the soil, it was found necessary to timber loose places and fill slides of earth, and to avoid this the contractor suggested wider excavation which was beneficial to the city and to which the engineer agreed, the contractor was entitled to recover compensation therefor in addition to his contract price.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.*]

4. Judgment (§ 180*)—Motion for Judgment—"Money Due on Contract."—Where plaintiff contracted to construct a sewer for a city during the progress of the work, it was found necessary to widen the excavation because of the character of the soil, and it was agreed between plaintiff and the city engineer that plaintiff should be allowed the same contract price for the extra excavation required which the city subsequently refused to pay, the amount due therefore was "money due on contract," and hence recoverable by motion for judgment as authorized by Code, § 3211.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 342; Dec. Dig. § 180.*

For other definitions, see Words and Phrases, vol. 3, pp. 2213-2220, vol. 8, p. 7643.]

Error to Circuit Court of City of Richmond.

Action by Hunter Burton against the City of Richmond. Judgment for plaintiff and defendant brings error. Affirmed.

H. R. Pollard, of Richmond, for plaintiff in error.
C. V. Meredith, of Richmond, for defendant in error.

KEITH, P. Burton brought suit against the city of Richmond to recover a balance alleged to be due for the excavation of a sewer, and recovered a judgment, which is now before us upon the petition of the city of Richmond to review certain rulings made during the trial of the case.

There appears to be no dispute as to the amount of excavation done, or the price charged. The payment of the demand was resisted by the city upon the ground that the additional work for which the claim is made was never authorized by the city or its agents, and that the officers of the city under whose supervision the work is alleged to have been done had no authority to make any change in or departure from the plans and specifications set out in the contract between the city and Burton.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

In the early stages of the work the contractor seems to have conformed substantially to the plans and specifications set out in the contract, and to the profile furnished him by the city engineer, but as the work progressed it was found that the material was of such a nature that the sides of the trench would give way and slough off into the ditch, and that to prevent this it was necessary to put in ribs of timber and fill in the place where the sloughing had taken place with bricks, and for the material and work thus made necessary the city made payment without objection. In consequence of this condition of things Burton approached the assistant city engineer in charge of the work for the city, and called his attention to the trouble and expressed the opinion that, if the trench were made wider and the weight taken off the sides by giving the banks a slope instead of having them perpendicular, it would be to the advantage of all parties concerned. The assistant city engineer acquiesced in this suggestion, and in consequence thereof the lines of the ditch were staked off much wider than the original plans, specifications, and profile called for, and the inspector under whose supervision the stakes were set kept a measurement of the additional excavation thus rendered necessary.

These are the facts which the evidence tends to prove on behalf of the defendant in error. They are controverted by the defendant in error. They are controverted by the plaintiff in error, but must be accepted by us, the verdict of the jury having found them to be true.

The view of the plaintiff in error is that the change was made and the additional work done as a matter of convenience to the contractors, as they were thereby enabled to use machinery to a greater advantage in the excavation of the trench; but there is evidence tending to show that by the method adopted the city was saved a considerable sum of money as the ribbing with timber was no longer necessary and the use of so many bricks was not required.

After the evidence was introduced to the jury the court gave certain instructions. The first to which we shall call attention was asked for by the defendant, and is predicated upon that provision in the contract which declares that the city engineer shall decide all questions and disputes of every nature relative to the construction, prosecution, and fulfillment of the contracts, and as to the character, quality, amount, and value of the work done and materials furnished, and that his decision upon all such points was to be final and conclusive upon both parties, and they must abide by his decision although it be erroneous, unless it be clearly proved by a preponderance of the evidence that such decision was fraudulently made, or that such a gross mistake was

made thereby as necessarily to imply bad faith on his part or a plain failure to exercise an honest judgment.

To the giving of this instruction the plaintiff excepted, but we are of opinion that it correctly states the law as it prevails in this court and in other jurisdictions, and could not be the subject of an assignment of error in any event as the judgment of the circuit court was for the plaintiff, and we therefore mention the instruction merely as tending to show that the case was properly submitted to the jury.

The city of Richmond offered two instructions which were refused, in which the court was asked to construe the contract between Burton and the city, and tell the jury that no one of the assistants of the city engineer or inspectors upon the work had any right to make any change or departure from the plans and specifications set out in the contract, even though the jury believed from the evidence that one of the assistant engineers or inspectors laid off the line of the ditch to be dug, and increased the dimensions thereof, which caused the cutting of the trench for the sewers of larger dimensions than those prescribed in the plans and specifications, yet such act on their part did not bind the defendant, the city of Richmond, and as a consequence the plaintiff is not entitled to recover in this action for the excess of excavation outside of that called for by the specifications.

The court also gave an instruction of its own motion, the first branch of which pertains to the duty of the city engineer under the contract to settle all questions of dispute as to the character, quality, amount and value of the work to be done and material furnished, and which declares his decision on all such points to be final and conclusive. It is conceded to be substantially a reiteration of the instruction upon the same subject already referred to as having been given at the instance of the plaintiff in error, and need not be further noticed. The second branch of the court's instruction is the converse of the principle announcement in the instructions asked for by the city and refused by the court, and tells the jury that if it was found necessary in the excavation to increase the dimensions greater than those shown upon the plans and that the line of the trench was widened by the city engineer or his assistant and that as so widened the plaintiff dug the trench as directed, then they should find for the plaintiff for such extra amount of excavation as they believed from the evidence was dug, and assess his damages at the same rate per cubic yard as was agreed upon in the proposal; the contention of the city being that the contract between the city and Burton constitutes the law of the case, that there could be no departure from it except as authorized by the contract itself, and that in all cases where a claim is made under a contract for ex-

tra work it is incumbent upon the contractor to show that the amount of such extra expense had been ascertained and the price and cost thereof agreed upon in writing between the city engineer and the conductor before the commencement of the work, while upon the part of the contractor the contention is that, reading the contract as a whole the officers of the city in charge of the work were authorized to deviate from the plans and specifications set out in the contract, and that for the additional work authorized by the assistant engineer the city was responsible. Upon the decision of this question the determination of this controversy must depend.

[1] We do not think that it can be successfully contended that the work here sued for was not done with the knowledge and approbation of the assistant engineer for the city. The evidence is full and complete that the attention of the city engineer was called to the trouble, the remedy suggested by the contractor and approved by the assistant engineer, and that as a consequence stakes were set which departed from the original profile furnished by the engineer's department to the contractors, and that the excavation was made in accordance with the new arrangement, that an account of the work so done was kept by the city's inspectors by direction of the assistant city engineer, and that as to the amount of work so done and the prices charged there is no dispute.

As to the contention of the city that the change was made to meet the interest and convenience of the contractors, there is evidence strongly tending to show that the city was benefited as well as the contractors, and that by the change a sum of money amounting to $4,000 or $5,000 was saved to the plaintiff in error.

The contract between the city and the contractor is to be considered as a whole so as to give effect to all of its parts. This rule of construction is elementary, is not questioned, and needs no citation of authorities in its support.

The second clause of the specifications provides that "the size and form of the sewer, its location and grade, the catch basins, stacks, manholes, or any other connections must conform with the plans on file in the office of the city engineer, subject to such modifications, additions or omissions as the city engineer may deem necessary during the execution of the work." And just here it may be well to observe that it is conceded that within the line of his duty the powers of the city engineer and his assistant are identical.

In clause 4 of the specifications it was provided: "Trenches to be dug in accordance with the lines, grades, depths and widths which will be given by the city engineer or his assistant from time to time. * * * Should it be found necessary in the ex-

cavation to increase the dimensions and depths greater than shown on the plans, there shall be no extra charge for such changes, but the contractor will be paid at the same rate per cubic yard as given in the original proposal."

In section 21 of the specifications it is provided that all directions, etc., necessary to complete any of the provisions of these, etc., specifications and give them due effect will be given by the city engineer or his assistant in charge, whenever requested by the contractor. "All lines and grades will be given by the city engineer or his assistant, and the contractor will be required to protect such stakes or marks and conform his work accurately thereto."

And in section 22: "The city engineer or his assistant and inspectors shall have access at all times to any and all parts of any work being done, for the purpose of inspection, measurement and establishment of lines and grades."

[2] In answer to all this the city contends that the authority of the city engineer and his assistant is limited and controlled by the 23d section of the specifications, which is as follows: "Before commencing any part of the work herein specified and described, the city engineer is authorized to make such changes in the lines and grades and dimensions which may not entail any extra expense to the contractor. And in the prosecution of the work, should there be any change in the lines, grades, or dimensions of the work to be done under the contract, which may entail cost to the contractor, it is understood and agreed that the amount of such extra cost and expense the contractor shall be subjected to shall be ascertained before the commencement of the work, and this agreement as to the amount to be paid shall be final."

We are satisfied that this section is not susceptible of the construction claimed for it by the plaintiff in error. The word "extra," as here used, has no reference to "work arising out of and entirely independent of the contract, something not required in its performance," but is the equivalent, we think, of additional work which was required in the performance of the contract—not necessary to the performance of the contract, in the sense that the contract could not have been carried out without it, but necessary in the sense that by means of it the contract could be more conveniently and beneficially performed in the interest of both parties to it.

That the work here sued for was not of the character contemplated in the twenty-third section further appears from the fact that there was no occasion to agree upon the price of the work, for that had already been agreed upon as so much per yard, and the compensation demanded here is the price per yard of excava-

tion as stated in the contract. That such is the definition to be given to the term "extra" as employed in the twenty-third section will more plainly appear by reference to the concluding portion of clause 4 of the specifications already quoted, as follows: "Should it be found necessary, in the excavation, to increase the dimensions and depths greater than shown on the plans, there shall be no extra charge for such changes, but the contractor will be paid at the same rate per cubic yard as given in the original proposal."

[3] We cannot say as a matter of law, looking to the entire contract, that the assistant engineer had no power to authorize the excavation of a trench wider than that set out in the contract and the specifications and the original profile, and we therefore are of opinion that the circuit court did not err in refusing to give the instruction asked for by the plaintiff in error.

It is proper for us to state that there is no suggestion in this record that there was any fraudulent act or intent upon the part of any of the agents or officers of the city, and we entertain no doubt that the city engineer acted throughout with no other purpose or motive than to render exact justice to all concerned; but we are further of opinion that the jury having been properly instructed, and the evidence being sufficient to sustain their verdict, there is no error in the judgment of the circuit court upon the questions thus far considered.

[4] The point is made in the petition for the writ of error that a motion for judgment was not the proper remedy in this case; that such demand, if due at all, was for damages resulting from the breach of the contract in the notice mentioned, and was recoverable only in an action sounding in damages, and is not money which the plaintiff is entitled to recover by action on any contract.

Granting that as the law stood at the time this suit was brought the proposition as stated in the petition is sound, this case does not come within its terms, and the case of Wilson *v.* Dawson, 96 Va. 687, 32 S. E. 461, so far from sustaining the contention of plaintiff in error, is decisive to the contrary. It is true that it was held in that case that "damages for an injury resulting from a breach of contract, recoverable only in an action 'sounding in damages' can in no sense be considered money due upon contract, and hence a motion under section 3211 of the Code, as it stood when this motion was made, * * * in any case where a person was 'entitled to recover money by action on any contract,' cannot be maintained to recover damages for a breach of contract, or the profits which the plaintiff would have made if he had been permitted to fulfill his contract." In that case the plaintiff filed a bill of particulars which consisted originally of 31

items, all of which except 1 to 7, inclusive, and 27 and 28, were abandoned. Items 1 to 7, inclusive, it seems, were for masonry, excavation, and concrete work done and stone quarried and delivered, while 27 and 28 were for profits claimed by Mrs. Dawson upon concrete and masonry work which she would have made had she been permitted to complete her contract. The claims in that bill of particulars illustrate what could be done and what could not be done under the law as it then stood. The case before us is plainly of like nature with the claims in that case for masonry, excavation, concrete work done and stone quarried, for which a recovery was permitted, while items 27 and 28 were for causes of action strictly "sounding in damages" for which a recovery was not allowed. As said in the opinion in the case cited: "The utmost that the plaintiff had a right to recover in this mode of proceeding is the amount of the first seven items of the account filed with the notice, and therefore the verdict and judgment, including damages for the breach of the contract, embraced in items 27 and 28 of the account, is, we think, clearly erroneous, and should be reversed and annulled."

Upon the whole case, we are of opinion that there is no error in the judgment before us which is affirmed.

Affirmed.

LAMBERT v. BARRETT.

June 12, 1913.

[78 S. E. 586.]

1. **Statutes (§ 158*)—Repeals by Implication.**—Repeals by implication are not favored by the courts, and the presumption is always against the intention to repeal when express terms are not used.

[Ed. Note.—For other cases, see Statute, Cent. Dig. § 228; Dec. Dig. § 158.*]

2. **Statutes (§ 159*)—Repeal—Presumption.**—To justify the presumption of intention to repeal one statute by another, the two statutes must be irreconcilable, and, if by a fair and reasonable construction they can be reconciled, both must stand.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 229; Dec. Dig. § 159.*]

3. **Municipal Corporations (§ 124*)—Council—Vacancy—Repeal of Statute—"Municipal Officers."**—Under Act Feb. 17, 1906 (Laws 1906, c. 24), authorizing the several cities and towns of the common-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.